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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1933

**No. 578.**

ALICE ASCHENBRENNER,
*Petitioner,*

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY,
*Respondent.*

**On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.**

## BRIEF FOR PETITIONER.

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ALICE ASCHENBRENNER,
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*Respondent.*

## BRIEF FOR PETITIONER.

### STATEMENT OF CASE.

This case comes to this Court on a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Ninth Circuit.

Petitioner sued respondent on a policy of accident insurance in which her husband was the insured and she was the beneficiary. The policy provided for a principal payment in case of loss of life resulting from accidental bodily injuries, and for double indemnity in the following language:

> "The amounts payable in all the foregoing schedules shall be doubled if 'such injury' is sustained by the insured.

(1) While a passenger in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service." (R. 4.)

The insured, who, it was conceded, had a railroad ticket in his pocket, jumped on a train after it had started. He stood with both feet on the lower step of the car and inside the vestibule. While so standing he was brushed off by another person, sustaining injuries from which he died.

At the trial in the District Court (Northern District of California, Southern Division) respondent conceded the accidental death and its liability for the single indemnity. A trial by jury resulted in a verdict for double indemnity. (R. 7.) Judgment was entered by the District Court in conformity with the verdict. (R. 8.) The Circuit Court of Appeals reversed the judgment of the District Court and remanded the case with instructions to enter a judgment for a smaller sum, the amount of the single indemnity. (R. 83-4.) A petition for a rehearing was denied by the Circuit Court of Appeals. (R. 85.)

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## OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 65) is reported in 65 Fed. (2d), 976.

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## THE FACTS.

The facts, as stated by the Circuit Court of Appeals, are, in part, as follows:

On the morning of October 29, 1934, the insured and a friend, Mr. Ishem, arrived at the Southern Pacific Railway station in Burlingame, California, in a taxicab. The cab drew up a distance of 25 to 40 feet from the train, which was just commencing to pull out of the station. The insured and his companion commenced running for the train across the station platform, somewhat on a diagonal. Ishem was on the left (toward the front end of the train) and a little ahead. When the two men reached the train, it was moving at a rate of speed estimated at from seven to ten miles an hour. The vestibule doors were open. According to the brakeman's testimony they were open because "the train was not out of the station." The insured jumped upon the lower step, his right hand grasping the handrail, and while standing there he was carried to where Ishem stood. The Circuit Court stated:

> "The cause of the accident, as indicated by the testimony of three of the witnesses, was that as the train moved forward, carrying the decedent [insured] to the point where Ishem stood, the decedent's overcoat or the small part of the decedent's body outside of the vestibule, brushed against Ishem and caused the decedent to loose his hold and fall. From the time he jumped on the train until he was carried to the point where Ishem stood, the decedent was standing with both feet on the lower step of the car and inside the vestibule, except for a small part of his body, which was outside. The decedent was carrying his overcoat over his left arm and a brief case in his right hand. After he was on the step he 'appar-

ently started to change hands with his overcoat or brief case.' " (R. 67.)

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## THE ISSUES IN THE CASE.

The issues presented in this case are threefold. They are as follows:

1. *The proper construction of the word "passenger" as used in the double indemnity provision of the insurance policy.*

The Circuit Court of Appeals erred in limiting the term "passenger," as used in the policy, to the strict and technical definition announced in public carrier cases where claims for negligence, based on the failure to exercise that high degree of care owing a passenger by a public carrier, are involved. In so doing, the Circuit Court disregarded the context of the policy, wherein the word "passenger" was used, and interpolated exceptions into the policy which the insurance company had not written there, and which were inconsistent with the language of the policy itself.

2. *The facts as found by the jury.*

The Circuit Court of Appeals erred in that it invaded the province of the jury when it made findings of fact of its own, which influenced its decision, instead of accepting the facts as found by the jury and implicit in their verdict.

3. *The constitutional question.*

The Circuit Court of Appeals erred in that it violated a Constitutional right of the petitioner in reversing and reducing the judgment of the District Court,

notwithstanding the verdict, and exceeded its authority in doing more than to order a new trial.

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## ARGUMENT.

### I.

### THE CONSTRUCTION OF THE WORD "PASSENGER."

**The construction adopted by the Circuit Court of Appeals.**

The insurance policy provided for double indemnity in case of injury to insured sustained "while a passenger in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service." The Circuit Court of Appeals, conceding a conflict in the authorities, applied to the word "passenger," as used in this double indemnity provision of the policy, the strict, technical construction of public carrier cases. That Court stated that the term "passenger" is used primarily in contracts, whether express or implied, between carriers and those who are transported by them, and that, for the proper definition of the term, reference must be had to the law of carriers. (R. 70.) The Court held, that in boarding a train after it had started, it was not sufficient that insured, to bring himself within the terms of the insurance contract, stand on the steps, or running board, or platform of the conveyance, but he must first have reached "a place of safety," as defined in negligence cases against carriers. The citations and quotations relied upon in the Circuit Court's opinion define such "a place of safety" as the "inside of the car." For example, White (Per-

sonal Injuries on Railroads, Vol. II, §§556 and 783), as quoted by the Circuit Court, states:

> "Nor does a person become a passenger, who gets on a train after it has started to move, until he actually reaches a place of safety inside the car." (R. 75-6.)

The Circuit Court also quoted authoritatively from *Merrill v. Eastern R. Co.*, (1 N. E. 548, 550), as defining the "place of safety" rule applicable to the case at bar. In this quotation is found this statement:

> "We may admit that if he had reached a place of safety, and *seated himself inside the car*, the bailment of his person to the defendant would have been accomplished, and that he would not have been prevented from asserting such rights because of his improper way of getting upon the train." (Italics ours.) (R. 79.)

The reason for the application of a restricted interpretation of the term "passenger" in a passenger-carrier case is obvious. In such a case there is involved not alone the failure of the carrier to observe that high degree of care which a public carrier owes to its passengers, and the question of its negligence in not so doing, but also the question of the contributory negligence of the passenger. If a person is negligent in boarding a train after it has started, it seems reasonable and proper that he first place himself in a position of safety within the conveyance provided for his use before he may predicate a claim for damages against the carrier, based upon the failure of the carrier to exercise toward him that high degree of care which a carrier owes its passengers. In other words,

he must first have completely shed the cloak of contributory negligence. So, too, a person negligently standing on the steps of a railway passenger car could not claim as against the carrier damages for an accident, without proving an intervening act of negligence on the part of the carrier. But the reason for the rule as applied to carrier cases is not applicable to the instant case. The question of possible negligence of the carrier, or of the insured, is not here involved. The insurance company did not attempt to restrict its coverage to the narrower field where the insured, or his heirs, could have recovered damages against the carrier. The language which the insurance company inserted in its policy plainly extended the coverage beyond the "zone of safety" as defined in negligence cases against carriers.

To limit the word "passenger" as used in the policy to "a place of safety inside the car" or to one who has "*seated himself inside the car*," as defined by White and in the *Merrill* case, quoted above, is to annul the language of the policy "in or on a public conveyance (including the platform, steps, or running board thereof)."

**The Circuit Court's reason for its construction.**

The Circuit Court of Appeals stated that the *reason* for the rule upon which it relied was that "a person acquiring the full status of a passenger is known to occupy an extremely safe situation, while one who is attempting to board a moving train is in a precarious state." (R. 80.) The Circuit Court frankly assumed that the reason the insurance com-

pany contracted to pay double indemnity was because this "place of safety" zone, as announced in carrier cases, is such an exceptionally safe situation for a passenger to occupy.

In support of its conclusion that the double indemnity provision of the policy was thus meant to be strictly construed, the opinion of the Circuit Court of Appeals contains several quotations. One authority so quoted (*Anable v. Fidelity & Casualty Co.*, 63 Atl. 92, 93) contains this statement:

> "The risk for which the defendant contracted to pay double insurance, was without doubt regarded as distinctly less hazardous than the single insurance risk. A passenger in a public conveyance who keeps himself within a car, or on a steamboat, is regarded as subjected to the slightest risk." (Italics ours.)

The Circuit Court also quoted from Fuller's "Accident and Employers' Liability Insurance, Co." (Chap. 4, p. 334), the following, as determining the limitations of the double indemnity clause of the policy:

> "The theory of this clause [double indemnity] is that the interior of a passenger car is a place of exceptional safety, and in view of the slight risk to one seated there, the insurance company can contract to pay a double indemnity in the event of injury or death." (R. 80-81.)

In connection with the Fuller quotation, the Circuit Court then added the following:

> "It is true that the learned author was not there discussing a policy containing the terms that

> form part of the policy in the instant case; but his observations regarding the *reason* for the rule namely, that a passenger is in an exceptionally safe situation—are in point here." (R. 81.)

The authority upon which the Circuit Court of Appeals apparently placed its chief reliance in support of its restricted construction of the double indemnity provision of the policy, is Cooley's Briefs on Insurance. (2d ed. Vol. 6, p. 5590.) The opinion of the Circuit Court quotes from Cooley the following:

> "Policies usually provide for the payment of double indemnity if the injury causing disability or death is received under certain specified conditions. One of the most common provisions is one that provides for double indemnity if the injury is received while riding as a passenger in any conveyance intended for the transportation of passengers. *In determining who is a passenger within such a clause, the same rules are applied as would govern if the action was (were) against the carrier.*" (R. 70-71.)

The quotation from the *Anable* case, given above, refers to one "who keeps himself within a car"; the Fuller quotation refers to one seated in the *interior* of a passenger car; while the rule stated by Cooley was confined to policies reading "while riding as a passenger *in* any conveyance." The policy involved in the instant case is not so restricted. The insurance company, in adopting the language "in or on a public conveyance (including the platform, steps, or running board thereof)" deliberately broadened the meaning of the word "passenger" beyond the limitations of the

Cooley rule. The policy not only provided for insurance coverage in favor of a passenger "on a public conveyance" as well as "in" it, but to give added force to the broader field implicit in the use of the word "on," it deliberately added the parenthetical phrase "including the platform, steps, or running board thereof."

To limit the word "passenger," as used in the policy, to one while riding "in any conveyance," upon the authority of the Cooley quotation, or to one who "keeps himself within the car," as announced in the Anable quotation, or "to one seated" in the interior of a passenger car, as suggested in the Fuller quotation, is to render futile the broad language of the policy which describes a "passenger" as including not only one "in a public conveyance," but also one "on a public conveyance (including the platform, steps, or running board thereof)."

**The Circuit Court of Appeals interpolated exceptions into the policy.**

The double indemnity provisions of the policy did not restrict insured to "a place of safety," as defined by carrier cases. To attribute to the insurance company the intention to limit the double indemnity risk to such "a place of safety," as was done by the Circuit Court, is not only to nullify the language of the policy, but to interpolate into the policy an unwarranted exception. Had such an exception been intended by the insurance company, apt words to express it could have been found.

> "While the double indemnity clause may have been intended particularly to cover accidents oc-

curring in a comparatively safe place, or where there are special safeguards that are likely to reduce the probability of injury, no such limitation can be found in the language used."

*London Guarantee & Accident Co., Ltd. v. Ladd* (C. C. A. 6), 299 Fed. 562, 564.

Neither was there any provision in the policy excepting the company from liability in the event insured was injured while getting on or off a moving conveyance. Had such an exception been intended by the insurance company, presumably it would have been expressed in the policy. That policies frequently do contain such exceptions is shown by the excerpts from a few such policies as set out in the Appendix to this brief, p. i.

Courts generally have held that if an exception to liability had been intended by the insurance company it is to be presumed that such an exception would have been written into the contract.

"Yet the policy—which was prepared by the company itself—does not in terms except from the risk * * * injuries * * * occurring while the insured is upon the platform of a moving car * * * The company well knew how to protect itself from undesirable risks. If, then, it intended to exclude from the benefit of the policy death resulting from an injury occurring while the insured was upon the platform of a moving car, it was easy to say so. Had this been the intention, presumably it would have been expressed. We think that it is not for the court to interpolate into the policy such an exception."

*Preferred Accident Ins. Co. v. Muir* (C. C. A. 3), 126 Fed. 926, 928.

The same principle has been enunciated by the California Courts, from whence this action emanates:

> "If it had been intended to restrict the insured to any particular part of the conveyance, apt words to express such intention could have been readily found and used."
>
> *Berliner v. Travelers' Ins. Co.*, 121 Cal. 458, 462.

**The correct meaning of the word "passenger" as used in the policy.**

The wording of the insurance policy here involved is frequently found in general accident policies. In drafting the double indemnity provision of the policy in question, it is fair to assume that the insurance company was familiar with the legal principles stated by Cooley (referred to previously) and announced in the carrier-negligence cases. It is also fair to assume that in deliberately adopting the broad language of the policy in the instant case the company did so in order to extend its liability and thereby make the policy more attractive to prospective policy holders.

The policy in this case contains its own evidence that the word "passenger" was not there used in the narrow sense which the word has acquired in the carrier-negligence cases to meet the exigencies of those cases. The selection of the word "on" the public conveyance, as well as "in" it, by the insurance company in describing the places where accidents might arise which were to be covered, and the additional reference to the platform and steps of the conveyance, indicate a deliberate intention on the part of the insurer to cover a broader field than the inside of a passenger car.

Instead of using the word "passenger" in any limited sense, the effort to use that term in its ordinary and popular sense is manifest. The company intended to insure the policy holder against any accident that might occur to him while on the platform, steps, or running board, or on or in any public conveyance provided by a common carrier for passenger service, providing the policy holder was one who had paid or expected to pay his fare. The company did not intend to insure the policy holder if traveling as a tramp, riding surreptitiously the brakebeams of a railroad car, or if traveling as an employee of the carrier, such as a train brakeman, or as a railway postal clerk. In *Wood v. General Accident Ins. Co.*, 156 Fed. 982, the trial Court held a railway postal clerk was not a "passenger" under the terms of an insurance policy. The trial Court said:

> "It is clear that the words 'actually riding as a passenger' and 'actually riding as passenger in or on any regular passenger conveyance' meant the indemnity should apply to the case of a passenger in the ordinary, common, everyday use of that word, and to an injury received while such person was in or on a regular passenger conveyance * * * and any other construction is to inject into the words used a meaning that is not their common, ordinary meaning."

Upon appeal of this case the Third Circuit Court of Appeals affirmed the decision of the trial Court (in 160 Fed. 926), stating:

> "As these words are ordinary words, the meaning of which is plain, they should, of course, be understood and applied accordingly; and that a

> mail clerk at work in a mail car is not, in common apprehension, 'actually riding as a passenger in or on any regular passenger conveyance,' cannot, we think, be reasonably questioned."

It was this ordinary and popular meaning of the term "passenger" which the policy holder had the right to claim was intended when used with the words "in or on a public conveyance (including the platform, steps, or running board thereof)."

**Authorities in support of petitioner's interpretation**

This Court has recognized the rule that the language of an insurance contract, being that of the insurance company, the meaning of its own words, in case of doubt, should be resolved against it.

> *Mutual Life Ins. Co. v. Hurni Packing Co.*, 263 U. S. 167, 44 S. Ct. Rep. 90.

Insurance contracts, like other contracts, are to be taken and understood in their plain, ordinary, and popular sense.

> *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 S. Ct. Rep. 379, at p. 381.

The Eighth Circuit Court of Appeals recognized this rule of construction in *Aetna Life Insurance Co. v. Davis*, 191 Fed. 343, 345, wherein was involved the question whether insured, injured in entering an elevator, was a passenger within the terms of the policy. The Court approved an instruction to the jury "to give to the words 'while a passenger in an elevator' the meaning they would in common acceptation be held to have."

Likewise the Sixth Circuit Court of Appeals (in the consolidated cases of *London Guarantee & Accident Co., Ltd. v. Ladd* and *Preferred Accident Insurance Co. of N. Y. v. Ladd*, 299 Fed. 562, 564), in construing the language of one of the insurance policies there involved, which read "while a passenger and is within a passenger elevator," held deceased was a passenger within the meaning of the policy when he entered the elevator shaft with intent to ride on the elevator as a passenger, although not actually entering the elevator itself. In that case the Court announced that the double indemnity provision of the policy should be construed in accordance with the same principles of law applicable to other provisions of the policy. The Court said:

> "It has been urged that the usual rules of interpretation of the language of an insurance policy most strongly against the company should not apply to a double indemnity clause. Although it is true that the social consequences of excluding the beneficiary from any recovery may be much graver than merely excluding him from the double indemnity benefits, and in a sense the double indemnity is exceptional and granted only under the specified conditions, nevertheless the double indemnity clause is but a part of a single obligation. The entire policy is drawn by the company. This provision, therefore, must be construed in the same manner as the other provisions of the policy."

Petitioner in presenting this case before the Circuit Court of Appeals, originally, and in its petition for a rehearing, cited these elevator cases wherein the word

"passenger" was construed. The Circuit Court was apparently unimpressed with these citations. Nevertheless, petitioner respectfully urges that if the word "passenger" as found in the double indemnity provision of an insurance policy may rightfully be construed in its plain, ordinary, and popular sense where the injury occurs in a public elevator, the insured may rightfully claim a like construction where the injury occurs "in or on a public conveyance."

> "We see no distinction in principle between the degree of care required from a carrier of passengers horizontally, by means of railway cars or stage coaches, and one who carries them vertically, by means of a passenger-elevator."
>
> *Mitchell v. Marker*, (C. C. A. 6), 62 Fed. 139. 142.

The case at bar is almost identical with a case decided by a state Court in Illinois, both as to the provisions of the policy and as to the facts. (*Fidelity & Casualty Co. v. Morrison*, 129 Ill. A. 360.) In that case the insured was held to be a passenger under the double indemnity clause of the policy when he stepped with but one foot on the platform of a moving train. The decision there reached is in direct conflict with the decision of the Circuit Court of Appeals.

## II.

### THE FACTS AS FOUND BY THE JURY.

**The Circuit Court substituted its own findings for those of the jury.**

The questions of fact were left to the jury for determination by the trial Court under suitable instructions. (R. 36-41.)

The important instruction given to the jury by the trial Court was (R. 39-40):

> "You are instructed that if you find from the evidence that the insured, Walter John Aschenbrenner, attempted on the 9th day of November, 1931, to get on board a public conveyance provided by a common carrier for passenger service and that at the time he made such attempt he held a ticket entitling him, by virtue of its issuance to him by such common carrier, to ride as a passenger upon said conveyance, and that at the time he attempted to get on board said conveyance, the conveyance was in motion and that he did, while the conveyance was in motion, *actually get on board* the same by reason of his lifting himself upon the steps and standing thereon with both of his feet upon a step of said conveyance while the same was in motion and holding with one hand to a hand rail attached to said conveyance for the purpose of enabling passengers to lift themselves to the step of said conveyance for the purpose of entering the same, and that the said insured did, while the said conveyance was in motion, *actually stand* with both feet upon a step of the conveyance and hold to said hand rail with one hand, and that while he was so standing and holding he *was thrown* from the said step, either

by reason of the increased motion of said conveyance or by being struck or jostled by another person attempting to get on board said conveyance, and that by reason of being so thrown he was hurled to the ground and thereupon and thereby suffered injuries from which he shortly died. then I instruct you that he was a passenger upon said conveyance at the time he was hurled therefrom and your verdict must be in favor of the plaintiff in the sum of $15,000." (Italics ours.)

There was implicit in the verdict of the jury, under this instruction, first, a finding that the insured did actually get on board the conveyance and did actually stand with both feet upon the step of the conveyance (and hold to the handrail with one hand), while it was in motion, and, secondly, a finding that while so standing and holding he was thrown from the conveyance by reason of being struck or jostled by another person attempting to get on board.

The Circuit Court of Appeals conceded the first finding when it said, in reciting the facts of the case:

"the decedent jumped upon the lower step, his right hand grasping the handrail, and, *while standing there,* he was carried to where Ishem stood. * * * From the time he jumped on the train until he was carried to the point where Ishem stood, the decedent *was standing with both feet on the lower step* of the car *and inside the vestibule,* except for a small part of his body, which was outside. * * * After he was on the step, he 'apparently started to change hands with his overcoat or brief case'." (Italics ours.) (R. 67.)

Later on in its opinion, the Circuit Court, however, substituted a different conclusion of fact as follows:

> "His attempt to board the train, and his fall therefrom were in reality parts of the same operation—an operation by which the decedent attempted, but unsuccessfully attempted, to attain the status of passenger." (R. 78.)

If the insured reached a position of stable equilibrium on the steps, even momentary—if he "was standing there"—the conclusion of the Circuit Court cannot logically follow.

The trial Court, under its instruction, left to the jury to determine if the accident occurred by reason of the increased motion of the train or by reason of being struck or jostled by another person attempting to get on board the conveyance. (R. 40.) There was no testimony tending to show that the accident occurred by reason of the increased motion of the train, while three witnesses testified that the accident occurred by reason of insured being struck or jostled by Ishem, who was attempting to board the conveyance. The verdict of the jury, therefore, implicitly found this latter fact to be the cause of the accident.

The Circuit Court of Appeals conceded this evidence when, in its opinion, it said:

> "The cause of the accident, as indicated by the testimony of three of the witnesses, was that, as the train moved forward, carrying the decedent to the point where Ishem stood, the decedent's overcoat or the small part of the decedent's body outside the vestibule, brushed against Ishem and

caused the decedent to loose his hold and fall." (R. 67.)

But disregarding this testimony, and the conclusion which the jury, by its verdict, necessarily found was the cause of the accident, the Circuit Court of Appeals announced this inconsistent conclusion:

> "The cause of his fall is not clear. While, as we have seen, three witnesses said that the decedent brushed against Ishem, the remaining witnesses did not know what caused him to fall." (R. 67.)

It was within the province of the jury to determine these questions of fact. The Circuit Court raised a doubt as to the findings of the jury—a doubt as to the cause of the fall of the insured, and a doubt as to whether insured in fact attained a position of stable equilibrium on the steps of the car, whether he did, in fact, "actually stand with both feet upon a step of the conveyance." (R. 40.) Having raised these doubts, the Circuit Court then invaded the exclusive province of the jury and asserted its own conclusions on the subject in the following language:

> "In the instant case, however, the event itself shows that decedent never reached a place of safety; else he would not have been killed! His position upon the lower step of the car was of so brief a duration, and his lack of equilibrium during that instant of time was so evident, that it would be paradoxical to say that the decedent had reached a place of safety at the time he fell off the car. His attempt to board the train, and his fall therefrom were in reality parts of the

same operation—an operation by which the decedent attempted, but unsuccessfully attempted, to attain the status of passenger." (R. 78.)

It is the prerogative of the jury to determine all questions of fact and the Court shall not assume, directly or indirectly, to take from the jury such prerogative.

*Walker v. New Mexico & S. P. R. Co.*, 165 U. S. 593, 17 Sup. Ct. Rep. 421, 422.

"That we may be inclined to a conclusion thereon differing from that expressed by the jury in their verdict is no ground for disturbing such verdict, if there can be found anywhere in the record evidence sufficient to warrant the court in sending the case to the jury."

*Commercial Travelers' Mut. Acc. Ass'n. v. Fulton* (C. C. A. 2), 93 Fed. 621, 622.

"It is not for us to set aside their [the jury's] verdict merely because, if the same questions were submitted to us as triers of the facts upon the same record, we might have reached a different conclusion."

*Heide v. Panoulias* (C. C. A. 2), 188 Fed. 914. 920.

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## III.

### THE CONSTITUTIONAL QUESTION.

The Circuit Court of Appeals in setting aside the verdict of the jury, assuming to pass upon the issues of fact, and directing a judgment for a lesser amount,

notwithstanding the verdict, violated the provisions of the Seventh Amendment to the United States Constitution, which provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Under the provisions of this amendment to the Constitution, as interpreted by this Court, the Circuit Court of Appeals was prohibited from directing a judgment, notwithstanding the verdict, based upon its own determination of the facts of the case. In doing so it presumed upon the prerogatives of the jury, and violated the right guaranteed by the Constitution.

In setting aside the verdict of the jury, or the judgment of the trial Court, for errors of law committed at the trial, the Appellate Court may not re-examine the facts and render its own verdict, but must order a new trial.

*Slocum v. New York Life Insurance Co.*, 228 U. S. 364, 33 Sup. Ct. Rep. 523;

*Fidelity Title & Trust Co. v. Dubois Electric Co.*, 253 U. S. 212, 40 Sup. Ct. Rep. 514.

See also:

*Glynn v. Krippner* (C. C. A. 8), 60 Fed. (2d) 406.

## CONCLUSION.

It is respectfully urged that the decision of the Court below be reversed and the judgment of the trial Court affirmed.

Dated, San Francisco, California,
January 17, 1934.

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**(Appendix Follows.)**

## Appendix

Insurance policies containing provisions limiting liability, as suggested in the accompanying brief (page 11), are found in a number of cases. The following excerpts from a few such cases are illustrative:

1. (*Sautelle v. Railway Pass. Assurance Co.*, 15 Blatchf. 216, 21 Fed. Cases 12,392.) "Standing, riding or being upon the platform of moving railway coaches, or entering or attempting to enter, leaving or attempting to leave, any public conveyance using steam as a motive power, while the same is in motion, are hazards not contemplated by the contract."

2. (*Standard Life & Accident Ins. Co. v. McNulty*, 157 Fed. 224 (C. C. A. 8).) Double indemnity provided "if such injuries are sustained by reason of the wrecking of a passenger car * * * while the insured is actually within it riding as a passenger." The policy also provided: "This insurance does not cover * * * injuries sustained * * * while entering or leaving, or trying to enter or leave, any moving conveyance."

3. (*Standard Life & Accident Ins. Co. v. Thornton*, 100 Fed. 582 (C. C. A. 6).) "The contract did not cover * * * death or disability resulting * * * from * * * entering or trying to enter or leave a moving conveyance using steam as a motor, or while riding on the platform or steps of any railway car."

4. (*Hull v. Equitable Acc. Ass'n* (Minn.), 42 N. W. 936.) "Standing, being or riding upon the platform of moving railway coaches (other than street cars), or riding in any other place not provided for the transportation of passengers, or entering or attempting to enter or leave any public conveyance using steam as the motive power, while the same is in motion, * * * are hazards not contemplated or covered by this certificate."

5. (*Preferred Acc. Ins. Co. v. Muir*, 126 Fed. 926 (C. C. A. 3).) "If such injury shall be received by the insured while riding as a passenger in or on a public conveyance * * * then the amount to be paid * * * shall be double the amount which would * * * be otherwise payable * * *. The double indemnities accruing * * * shall not, however, be applicable to any injury * * * which may result from an attempt to enter or leave any of the conveyances therein specified."

6. (*London Guarantee & Accident Co. v. Ladd*, (C. C. A. 6), 299 Fed. 562 (consolidated cases).)

One policy provided:

"The amount to be paid * * * shall be double * * * if such injuries are sustained while riding as a passenger in a car intended for the use of passengers, and being in or upon any passenger car on a railway using steam, cable, or electricity as a motive power * * *. Double payments * * * shall not apply to any accident or injury, fatal or otherwise, sustained while getting on or off or

being upon the step or steps of any railway or street railway car."

The other policy provided:

"If such bodily injury is sustained by means as aforesaid (1) while the insured is a passenger and is in or upon any railway (or street railway) passenger car (including the platform, steps, or running board thereof) * * * the amount to be paid shall be double the sum which would otherwise be payable * * *. But any accident or injury, fatal or otherwise, sustained while getting on or off of any railway (or street railway) passenger car shall be covered only for single indemnity."